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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

KURT HAEKER, **Plaintiff,** **vs.** **UNITED STATES OF AMERICA,** **Defendant.**	**CV-14-20-BLG-SPW-CSO** **UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Procedural History

On February 26, 2014, Plaintiff filed a complaint in the above-captioned matter. Plaintiff's complaint seeks to partition 60 acres of land in Allotment 3316, a parcel held in trust by the United States within the exterior boundaries of the Crow Reservation. Plaintiff's original complaint was inadequate because Plaintiff filed it on behalf of a Limited Liability Corporation, and he is not licensed to practice law. Doc. 9. Plaintiff amended his complaint on May 13, 2014, asserting that the Limited Liability Corporation conveyed an undivided fee interest in trust Allotment 3316 to him. On May 22, 2014, the United States moved to dismiss Plaintiff's amended complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff filed a second amended complaint on June 6, 2014.

Plaintiff's second amended complaint (Doc. 19) seeks to partition 60 acres of Allotment 3316. Allotment 3316 is located on the Crow Indian Reservation. It is comprised of approximately 840 acres located in three sections, *i.e.*, Section 7 contains approximately 160 acres in Big Horn County, Section 28 contains approximately 120 acres in Big Horn County, and Section 33 contains approximately 560 acres in Yellowstone County. *See* Exhibit 1, BIA Title Status Report certified on June 20, 2014. As noted in the Title Status Report, Allotment "3316 is held by the United States of America in trust for the land owner(s) with trust interests and/or by the land owner(s) with restricted interests and/or fee simple interests . . . . Ownership is in unity and interests are owned in the following title status: trust, fee." Exhibit 1 at 1 (emphasis added).

Plaintiff asks this Court to partition "the NE quarter of the NE Quarter and the North Half of the Southeast Quarter of the North east quarter of Section 33 Range 29 East, Township 3 south, Section 33 consisting of 60 acres and vest title in the name of Kurt Haeker." Doc. 19 at 4, lines 110-114.

History of Allotment 3316

In 2009 Yellowstone County levied $28.95 in taxes against the 1/9% undivided fee interest in Allotment 3316. *See* attached Exhibit 2, Tax Deed corrected and recorded on May 5, 2014 under Doc. No. 3704484 to reflect 560 acres in Section 33.[1] The former owner of the undivided fee interest, Diana C. Feller, did not redeem the lien within the time allowed by law, and on July 9, 2010, Yellowstone County bought the tax lien for $356.00. *Id.* Yellowstone County assigned the tax lien to Colorado Assets LLC on December 15, 2011, and shortly

[1] While the total acreage of 560 acres set forth in the corrected tax deed is correct, the real property description is not correct. The real property description of the 560 acres in Section 33 is S1/2, NE1/4, E1/2NW1/4. *See* Title Status Report attached as Exhibit 1 and Patent No. 25-85-0445 attached as Exhibit 4.

thereafter issued a tax sale certificate to Colorado Assets LLC. *Id.* Yellowstone County issued a tax deed for the 1/9% undivided fee interest in Allotment 3316 to Colorado Assets LLC on December 9, 2013. *Id.* Colorado Assets LLC subsequently conveyed the 1/9% undivided fee interest in Allotment 3316 to Plaintiff. *See* attached Exhibit 3, Quit Claim Deed.

Standard of Review

On a motion to dismiss a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., the party asserting claims has the burden of demonstrating that jurisdiction exists. *Thornhill Pub. Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Kingman Reef Atoll Inv., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008).

The court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). In adjudicating a motion to dismiss for lack of jurisdiction, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *Ass'n of American Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Where the court concludes that it lacks jurisdiction, it must dismiss the action without reaching the merits of the complaint. *High Country Res. v. FERC*, 255 F.3d 741, 748 (9th Cir. 2001).

Argument

A. 28 U.S.C. §§ 2409 and 1347 do not provide a basis for this court to exercise subject matter jurisdiction.

Plaintiff argues that this Court has jurisdiction under 28 U.S.C. § 1347. Section 1347 governs partition actions where the United States is a tenant in common or a joint tenant. The statute states:

> The district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants.

28 U.S.C. § 1347.

In addition, Plaintiff argues that he is entitled to partition his undivided fee interest in the allotted trust land pursuant to 28 U.S.C. § 2409. Section 2409 states that:

> Any civil action by any tenant in common or joint tenant owning an undivided interest in lands, where the United States is one of such tenants in common or joint

> tenants, against the United States alone or against the United States and any other of such owners, shall proceed, and be determined, in the same manner as would a similar action between private persons.

28 U.S.C. § 2409.

Sections 2409 and 1347 contemplate situations where the United States is a joint tenant or tenant in common with the party seeking relief. Contrary to Plaintiff's assertion, the United States is not a joint tenant or tenant in common with Plaintiff or any of the undivided trust interest owners of Allotment 3316. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 143 (1972). In *Affiliated Ute*, the Supreme Court held that 28 U.S.C. § 2409 did not provide jurisdiction where Indian tribal members sought distribution of their interest in a mineral estate in land to which the United States held title. *Id.* Rather, that statute applies only to partition suits where the United States is a tenant in common or a joint tenant. *Id.*; *see also Quiver v. Deputy Asst. Sec'y, Indian Affairs*, 92 I.D. 628 (1985) (holding that the Bureau of Indian Affairs is not a tenant in common with the non-trust holders of fee interests in an Indian allotment).

While legal title in Allotment 3316 is vested in the United States, the beneficial title is owned by Indian owners with undivided trust interests and Plaintiff, a non-Indian owner with undivided fee interests. *Quiver*, 92 I.D. at 633; *Affiliated Ute*, 406 U.S. at 141; *see* attached Exhibit 1, Title Status Report. The United States has a fiduciary duty to the Indian trust interest owners. *United States v. Mitchell*, 445 U.S. 535, 542 (1980). The United States has a trust responsibility to the individual trust interest holder for the common property as a whole, no matter what percentage of the undivided interests are held in trust. *Bailess v. Paukune*, 344 U.S. 171, 173 (1952); *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983).

Although the common property may be considered to be held in trust, the United States is not a tenant in common with the undivided interest owners. *Quiver*, 92 I.D. at 633; *Affiliated Ute*, 406 U.S. at 143; *United States v. Algoma Lumber*, 305 U.S. 415 (1939). Unlike tenants in common, the United States has no right to possess or use Indian trust or restricted land. *Algoma Lumber*, 305 U.S. at 421. The United States has only limited statutory and regulatory rights and duties, including approval or disapproval of conveyances of the land by the protected Indian owners. *Id.*; *see also Mitchell*, 445 U.S. at 542-543.

Plaintiff wrongly claims that Allotment 3316 "is not trust land, . . . [it] is fee land that the United States expressly patented." Doc. 19 at 4. Plaintiff's patent is for an undivided fee interest in an Indian allotment held in trust by the United States for the benefit of the individual Indian allottees. *See Bailess*, 344 U.S. at 173. Plaintiff may sell, lease, or otherwise dispose of his undivided fee interest in the common property without the consent of the other cotenants and without other owners joining in the conveyance. *United States v. Craft*, 535 U.S. 274, 279-280 (2002). But, for the purposes of the United States' administration of the trust duty owed to the individual Indian trust interest owners, the common property, to which the United States holds title, is treated as trust land. *See Bailess*, 344 U.S. at 173. There is not a particular segment of the actual physical land in Allotment 3316 that can be identified as trust or fee. If Plaintiff wants to partition 60 acres of land (an area equal to his undivided fee interest in Allotment 3316), he must negotiate with the other undivided interest owners, not seek partition against the United States under inapplicable statutory authority.

Plaintiff has not shown that he is a tenant in common or a joint tenant with the United States, so Plaintiff has failed establish this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1347 or § 2409. *Affiliated Ute*, 406 U.S. at 139-143.

B. The United States has not waived its sovereign immunity under the Quiet Title Act.

Plaintiff argues that "Congress has retained sovereign immunity for Indian Trust Lands, however this applies to quiet title actions, 28 USC 2409a (Quiet Title Act), not partition actions governed by 28 USC 2409, and relief sought is not to divest the US of legal title." Doc. 19 at 4.

The Quiet Title Act deprives this Court of jurisdiction to partition trust Allotment 3316 because Plaintiff is an adverse claimant to the United States' title and partition would certainly divest the United States of title to that portion of the trust land that Plaintiff seeks to partition.

In cases concerning the United States' title to real property, the Supreme Court has construed the Quiet Title Act, 28 U.S.C. § 2409a, as a waiver of sovereign immunity providing the exclusive means for challenging such title. *Block v. North Dakota*, 461 U.S. 273, 286 n.22 (1983); *United States v. Mottaz*, 476 U.S. 834, 843 (1986); *see also Wildman v. United States*, 827 F.2d 1306, 1308 (9th Cir. 1987). The Quiet Title Act permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. *Block*, 461 U.S. at 286 n.22; *Mottaz*, 476 U.S. at 843; *Wildman*, 827 F.2d at 1308. But when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the United States is immune from suit under the Quiet Title Act. *Mottaz*, 476 U.S. at 843; *Wildman*, 827 F.2d at 1308.

The Quiet Title Act's "Indian lands" exception renders the federal government immune because Plaintiff is an adverse claimant asserting a competing property interest in Allotment 3316. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2206-2208 (2012). Plaintiff, an "adverse claimant," wants to divest the United States of its title to 60 acres in the allotment and desires a declaration that he alone possesses valid title to those 60 acres. *See id.* at 2207; *Mottaz*, 476 U. S. at 842 ("What [the plaintiff] seeks is a declaration that she alone possesses valid title."). The Indian lands exception to the Quiet Title Act forbids this action.

Similarly, in *Ducheneaux v. Secretary of the Interior*, a non-Indian sought to partition her deceased Indian husband's land held in trust by the United States. *Ducheneaux*, 837 F.2d 340 (8th Cir.), *cert. denied*, 486 U.S. 1055 (1988). The Eighth Circuit held that the Quiet Title Act deprives a federal court of jurisdiction to partition trust property where partition would divest the United States of title to a portion of the property. *Id.* at 344. Such claims are barred under the only statute that allows suit against the federal government, i.e., the Quiet Title Act.

Preservation of immunity under the Indian lands exception to the Quiet Title Act applies as long as the government has a "colorable claim" regarding its title as trustee to the land at issue. *Wildman*, 827 F.2d at 1309; *Alaska v. Babbitt*, 182 F.3d 672, 675 (9th Cir. 1999) ("[T]he Indian lands exception applies only if the lands at issue are Indian lands, or at least colorably so."). The colorable claim requirement is not a burdensome one. *Wildman*, 827 F.2d at 1309.

"[T]he purpose of the doctrine is to prevent judicial examination of the merits of the government's position." *Id.* Accordingly, to the extent the Quiet Title Act allows any inquiry on the merits, that inquiry is limited to a determination that the government has some rationale for its claim. *Alaska v. Babbitt*, 38 F.3d 1068, 1076 (9th Cir. 1994).

In this case, the Title Status Report for Allotment 3316 attached as Exhibit 1 confirms that the United States holds Allotment 3316 in trust for the benefit of the individual Indian allottees. The United States' interest in Allotment 3316 is, therefore, the type contemplated by the "trust or restricted Indian lands" limitation of the Quiet Title Act. As a result, the United States has not waived its sovereign immunity and this case must be dismissed.

Conclusion

For the foregoing reasons, the Court lacks subject matter jurisdiction and the second amended complaint must be dismissed with prejudice.

DATED this 20th day of June, 2014.

MICHAEL W. COTTER
United States Attorney

/s/ MARK STEGER SMITH___
Assistant U. S. Attorney
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 2,277 words, excluding the caption and certificates of compliance and service.

DATED this 20th day of June, 2014.

/s/ MARK STEGER SMITH__
Assistant U. S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2014, a copy of the foregoing document was served on the following persons by the following means:

_1-2_ CM/ECF
_____ Hand Delivery
__2_ U.S. Mail
_____ Overnight Delivery Service
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